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IN THE

Supreme Court of the United States of America

DERRELL PHILYAW.....APPELLANT

VS. NO. 821

STATE OF ARKANSAS.....APPELLEE

JURISDICTIONAL STATEMENT.

APPEAL FROM THE SUPREME COURT OF ARKANSAS
TO THE SUPREME COURT OF THE UNITED STATES.

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I.

The opinions delivered in the Supreme Court of Arkansas, both the majority opinion and the minority dissenting opinion, are reported in 305 SW (2d) 851, ... Ark. ..... Such opinions are attached hereto in the appendix.

II.

CONCISE STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

NATURE OF THE PROCEEDINGS.

This is a criminal case originating in the Circuit Court of Miller County, Arkansas, by Information filed by the Prosecuting Attorney on December 28,

1956, in which the Information charges, omitting the formal parts, as follows:

> " . . . in Miller County, Arkansas, did unlawfully, willfully and feloniously have and keep in his possession a certain still and still worm to be used and operated as a distillery for the purpose of making and manufacturing alcoholic, vinous, malt, spirituous and fermented liquors without registering the same with the proper United States officials as is required by law against the peace and dignity of the State of Arkansas."

It will be noted that the Appellant was very specifically charged with possession of a certain still and still worm to be used and operated as a distillery without registering the same with the proper United States Officials as required by law. The Information plainly charges the possession of a complete distillery of such a type and design as would require registration under the law of the United States.

The Federal Statute requires registration as follows:

> "26 U.S.C. 5174: Registry of stills. (a) Requirement. — Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register such still or apparatus with the Secretary or his delegate immediately on its being set up, by subscribing and filing with the Secretary or his delegate a statement, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its cubic contents, the owner thereof, his place of residence and the purpose for which said still or distilling apparatus has been or is intended to be used:

Provided, That stills or distilling apparatus not used or intended to be used for the distillation, redistillation, or recovery of distilled spirits are not required to be registered under this section."

The plain simple legal intent of the pleader drafting the Information was to charge the offense of possessing a complete distillery, complete with still worm, without registering the same with the proper Officials of the United States. A Federal question was raised by the Information itself. It is urged that the appeal should be allowed under Rule 36 of the United States Supreme Court Rules. The Chief Justice of the Supreme Court of Arkansas entered an order on December 23rd granting the appeal to the Supreme Court of the United States and taking security and staying execution pending such appeal.

On March 4th, 1957, the Appellant pleaded not guilty, the case was tried and at the close of the state's case the Defendant moved for an instructed verdict, which appears in detail beginning at Page 21 of the Appellant's original Abstract and Brief. The Federal question was there raised. See Page 23 of Abstract. The trial court sentenced Appellant to three years in the penitentiary. Appellant filed his Motion for a New Trial which was overruled and Appellant thereupon perfected an appeal to the Supreme Court of Arkansas. The Judgment of the Supreme Court of Arkansas affirming the conviction was entered October 14, 1957, and the Appellant exhausted his remedies before the Supreme Court of Arkansas by filing a Petition for Rehearing, which was denied on November 11, 1957; notice of appeal was filed in the Supreme Court of Arkansas on November 15, 1957, and subsequently the time for perfecting this appeal to the Supreme Court of the

United States was enlarged until February 28, 1958.

The Statutes pursuant to which the appeal is brought is Title 28 U.S.C.A. 2101 and 28 U.S.C.A. 869.

The cases believed to sustain jurisdiction are *United States vs. Cafero*, 55 Fed. (2d) 219, and *United States vs. Moses*, 205 Fed. (2d) 358.

QUESTIONS PRESENTED BY APPEAL.

QUESTION No. I. The states cannot by legislative act or judicial precedent nullify, abrogate, modify or repeal the Acts of Congress.

QUESTION No. II. The Appellant has been denied due process of law guaranteed to him by the Fourteenth Amendment to the Constitution of the United States in that he was convicted of an offense with which he was not charged.

QUESTION No. III. The Information charged a specific offense but the accused was convicted of a different offense not embraced or included in the charge. The trial court erroneously construed 26 U.S.C. 5117 not in accordance with Federal decisions and the majority of the Arkansas Supreme Court erroneously construed the Federal Statute not in accordance with Federal decisions.

That the Notice of Appeal and Jurisdictional Statement to accompany the Notice of Appeal as filed in the Supreme Court of the State of Arkansas embraced and included the questions herein raised.

CONCISE STATEMENT OF THE CASE.

The Appellant was charged, as stated, with possession of a complete still and distillery, which was subject to registration and the Information charged that the same was not registered with the proper United States Officials. There was no question raised as to whether it was registered with the State of Arkansas or not. To determine what law requires registration we must, of course, examine the Federal Statutes, and the Appellant had a right to read and interpret the Information filed against him as charging him under the Arkansas Statutes 48-937 with the offense of possessing a distilling apparatus sufficiently complete to require such registration. The Federal questions sought to be reviewed were raised by the Appellant's Motion for an instructed verdict of not guilty. The Federal question had been tendered by the Information itself. The Federal question was raised again in the Defendant's Motion to enter judgment declaring Defendant not guilty, which appears in detail at Page 8 in the Abstract and Brief for Appellant filed with the Record herein. The very question, that as a matter of law, the Statutes of the United States do not require registration of any distilling apparatus other than a full and complete still was raised in this Motion. See Pages 8 and 9 of Abstract and Brief filed by Appellant in the Supreme Court of Arkansas, and the trial court as reflected by 7 and 8 of the original Transcript. The Appellant raised the specific question that the State of Arkansas is without power to make requirements for the United States of America other than those made by the Congress of the United States. In the objections to the charge of the court to the jury the Federal question

was raised. See Page 42 of Abstract, Pages 68 and 69 of original Transcript.

SUBSTANTIAL FEDERAL QUESTIONS ARE RAISED.

States certainly cannot legislate for the Congress of the United States and make requirements for the registration of less than a complete and set up still with the proper United States Officials. The states cannot do this any more than they can secede from the Union, declare war, nullify the acts of Congress or refuse to be bound by the Supreme Court decisions. It may be contended that the encroachment upon the Federal sovereignty is small in the instant case, but if the State of Arkansas can pass laws for the entire United States it ceases to be one of many and becomes one over many.

In the original charge against the Appellant there was no evidence to sustain the charge and the Appellant was entitled to an acquittal. See Ex Parte Bain 121 U.S. 1, 7 S. Ct. 781.

The Appellant was convicted with an offense with which he was not charged, and that amounted to a denial of due process of law. Justice George Rose Smith in his dissenting opinion in the instant case comments very accurately:

> "The Information was not complete or defective. It charged a specific offense, but the accused was convicted of a different offense. If Philyaw had been accused of murder and convicted of robbery, apparently the majority would find no prejudice, for he might have asked for a bill of particulars."

In *Commonwealth vs. Graham*, a Pennsylvania

case, 83 Atlantic (2) 632, the Appellate Court ruled that a conviction of a defendant of a crime for which he had not been indicted was a denial of due process of law.

In the case of *State vs. Sweet*, a South Carolina case, 70 SE (2d) 234, the Appellate Court ruled that reversible error resulted when the Appellants charged with the offense of housebreaking committed in the day time were found guilty of a different offense, namely housebreaking in the night time.

The Supreme Court of the United States said in the case of *Carter vs. People*, 67 S. Ct. 216:

> "The solicitude for securing justice thus embodied in the Due Process Clause is not satisfied by formal compliance or merely procedural regularity. It is not conclusive that the proceedings resulting in incarceration are unassailable on the face of the record. A state must give one whom it deprives of freedom the opportunity to open an inquiry into the intrinsic fairness of a criminal process even though it appears proper on the surface. Questions of fundamental justice protected by the Due Process Clause may be raised, to use lawyer's language, dehors the record."

Obviously both the trial court and the learned Supreme Court of the State of Arkansas misconstrued the Federal Statute requiring registration of a distillery. The Appellant earnestly insists that the questions presented are so substantial as to require plenary consideration with briefs upon the merits, and in the alternative, in the event it should be decided that this is not a proper case for appeal, the Appellant urges that this be treated as a Petition for Writ of Certiorari.